Supreme Court, U.S.
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No. 89-99

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MARJEC, INC.,
Petitioner,
v.
HOME AND LOT OWNERS ASSOCIATION
OF SHAWNEE-LAND, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

DALE A. DAVENPORT *
342 South Main Street
Harrisonburg, Virginia 22801
(703) 433-2444
Counsel for the Respondent

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

The Respondent accepts the Petitioner's statement of the question presented.

PARTIES TO THE PROCEEDING

The Respondent accepts the Petitioner's statement of the parties.

The Respondent has no parent corporaton, subsidiaries or affiliates.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Respondent accepts the Petitioner's statement of the opinions below.

JURISDICTION

The Respondent accepts the Petitioner's statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The judicial power shall extend to all cases, in law and equity, arising under . . . the laws of the United States . . . ." U.S. Const. art. III, § 2.

COUNTERSTATEMENT OF THE CASE

The Petitioner, Marjec, Inc., ("Marjec") the developer of Shawnee-Land, a 3,500 lot subdivision in Frederick County, Virginia, filed bankruptcy in 1978. After waiting eight years without results for Marjec to reorganize, the Home and Lot Owners Association of Shawnee-Land, Inc. ("HALOAS") sought to buy from Marjec's trustee the common property and roads in the subdivision and all future rights of Marjec to payments by lot owners of maintenance monies ("due rights"). This was the first step in a HALOAS plan to rehabilitate the subdivision. HALOAS intended to petition the state court for the formation of a sanitary district[1], transfer the common property and roads to that district and cancel the dues rights. This would leave the sanitary district as the provider of common maintenance in the subdivision, replacing Marjec which had defaulted in the performance of that maintenance due to its financial problems. (Petition, pp. 16a-17a)

The trustee and lien creditors supported the proposed sale of the roads, common property and dues rights; only Marjec was opposed. During the three days of hearings in the bankruptcy court, the judge raised the issue of the past dues rights, which HALOAS had not asked to purchase. Marjec has stated in its Petition that the parties were not advised that the past dues rights might be included in the bankruptcy court order, but as the District Court noted, before the case was over in bankruptcy court it was obvious to Marjec that all the dues rights, past and future, were involved. (App., p. 2a)

The bankruptcy judge determined that no equity existed in the common property and that the roads had no market value, and authorized the sale to HALOAS.

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[1] In Virginia, a sanitary district is a special taxing district administered as a division of county government and empowered to provide a wide variety of municipal services to persons within the district.

He also found all of the dues rights unenforceable because of Marjec's bankruptcy. He directed the trustee to transfer to HALOAS the past dues rights, as well as the present and future rights, on the condition that they all be canceled in the local land records, to avoid the possibility that lot owners would be harassed by lawsuits at some later time. (Petition, p. 22a)

The bankruptcy court sale order containing the cancellation provisions was entered early on December 29, 1986 and HALOAS, which had been checking with the bankruptcy clerk daily, learned of it around noon that day. The transfer and release instruments for the dues rights and the deed for the roads and common property were executed in the late afternoon of December 30 and were recorded in the Clerk's Office of the Circuit Court of Frederick County shortly after 9:00 a. m. on December 31st. Marjec appealed the sale order but never sought a stay. Marjec has never contended that HALOAS acted wrongfully in accepting the transfer instruments from the trustee or promptly recording those instruments and the release instrument as directed by the court order.

In July, 1987 a sanitary district was created for the subdivision by the state court as a special taxing entity of Frederick County. The real property HALOAS had acquired from the trustee was conveyed to the sanitary district, and the district commenced maintenance activity on the roads and common properties, funded by a tax on the real estate in the subdivision. (App., pp. 3a-4a)[2]

SUMMARY OF ARGUMENT

Two of the key facts upon which Petitioner bases its argument for review were found by lower court judges to be contrary to Petitioner's statement in its petition.

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[2] The affidavit of the Frederick County Administrator partially reproduced in the appendix to this brief was submitted to the district court as a supplement to HALOAS's motion to dismiss the appeal.

A third key fact is not fully developed in the record. This Court would have to first deal with these factual disputes and omissions before reaching the question presented.

Further, this Court should not review this case because the legal issue involved is of no wide import and is limited to the peculiar facts of this case.

Moreover, the Court of Appeals was correct in finding the case moot because so much occurred after the bankruptcy sale order that no court can at this late date restore the persons affected to their prior positions.

Lastly, the action taken by the bankruptcy court in ordering the cancellation of the dues rights was a just, common-sense solution to a practical problem. It kept some future holder of the dues rights from exacting money from unsophisticated lot owners who might pay upon demand even though Marjec's bankruptcy had rendered the dues rights unenforceable. No problem with the maintenance of common properties has arisen from the cancellation of the dues rights, because the creation of a sanitary district has since provided an alternative method of maintaining the roads and common properties.

REASONS FOR NOT GRANTING THE WRIT

I. MARJEC'S CLAIM IS BASED UPON DISPUTED OR UNCLEAR FACTS.

There are three factual components in Marjec's claim: (a) lack of notice that the past dues rights were to be transferred, (b) lack of consideration for the transfer of the past dues rights, and (c) a race to the courthouse won by HALOAS. Marjec argues that these three circumstances together merit an exception to the usual rule that a finally accomplished transfer is moot and not subject to appeal.

The first two allegations conflict with statements of judges who heard the case and its appeal. The district court said that Marjec knew the past dues rights were being considered by the bankruptcy court. The bankruptcy court found the dues rights probably were unenforceable, which clearly shows that they were not "valuable property" as Marjec contends. As to the third allegation, there is nothing in the record to show whether Marjec learned quickly that the dues rights were released and actually felt precluded from obtaining a stay, or whether it learned of the release recordation at a much later time, after it had failed to ask for a stay for some other reason. Even after the release instrument was recorded, Marjec could have requested that a copy of a stay order be recorded and referenced against the release instrument. Bankruptcy Rule 8005. That would have warned third parties not to rely on the release instrument and alerted them to the appeal.

These problems create a disorderly factual background which would prevent this Court from easily addressing the question presented.

II. THIS CASE DOES NOT RAISE AN ISSUE OF WIDE IMPORTANCE, BUT RATHER PRESENTS A QUESTION ARISING FROM A CONFLUENCE OF UNUSUAL FACTS.

The basic complaint of Marjec is that a bankruptcy court directed a trustee to sell estate assets not sought or paid for, which coupled with the purchaser's early awareness of the sale order entry permitted the consummation of the transaction before the debtor could arrange a stay pending appeal. These facts are unusual and unlikely to occur again. The issue that Marjec says arises from them does not merit review by this Court.

III. THE COURT OF APPEALS DECIDED THIS CASE CORRECTLY.

Even if Marjec's allegations of lack of notice, lack of consideration and a race to the courthouse were correct, the case would still be moot because the transfer and release cannot now be undone. It will soon be three years since the transfer and release instruments were recorded in the land records, and any judicial effort to turn back the clock would only hurt the many other persons who have been entitled to rely upon the public record. The Court of Appeals rightly saw that the matter had developed too far and was no longer a case or controversy susceptible of judicial correction. U.S. Const. art. III, § 2; *Mills v. Green*, 159 U.S. 651, 653; 16 S.Ct. 132, 133; 40 L.Ed. 293(1895); *Heitmuller v. Stokes*, 256 U.S. 359, 362; 65 L.Ed. 990; 41 S.Ct. 522(1921); *Liner v. Jafco, Inc.*, 375 U.S. 301, 306, n.3; 11 L.Ed. 2d 347; 84 S.Ct. 391(1964).

IV. THE BANKRUPTCY COURT ORDER WAS FAIR AND PRACTICAL.

The bankruptcy court order resulted in the cancellation of the dues rights which only could have been used to harass the lot owners. Marjec's bankruptcy and its failure to properly maintain the subdivision had much earlier constituted a breach of its part of the dues agreements with the lot owners. Yet the bankruptcy court knew that if dunning letters were sent out, probably some of the less informed or more timid lot owners would pay. Such an inequitable result was to be prevented, if possible, and the bankruptcy judge wisely took the opportunity to do so. The establishment of the sanitary district with its taxing powers under Virginia law ensured that the roads and common properties will be adequately maintained in the future. The sanitary district has become a far superior replacement for Marjec, which had not adequately provided for the maintenance of the roads and common properties since it filed bankruptcy in 1978.

CONCLUSION

It is respectfully submitted that Marjec's petition for a writ of certiorari should be denied for the reasons stated above.

Respectfully submitted,

DALE A. DAVENPORT *
342 South Main Street
Harrisonburg, Virginia 22801
(703) 433-2444
Counsel for the Respondent

* Counsel of Record

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

Bankruptcy No. 78-00245
Civil Action No. 87-0046-H

HOME AND LOT OWNERS ASSOCIATION
OF SHAWNEE-LAND, INC.,
Plaintiff

VS

JOHN G. LEAKE, Trustee, *et al.*,
Defendant

April 11, 1988
4:00 p.m.

(COPY)

TRANSCRIPT OF HEARING BEFORE
THE HONORABLE JAMES H. MICHAEL, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

HOOVER, HOOVER, PENROD & DAVENPORT, ESQS.
Harrisonburg, Virginia
By: DALE A. DAVENPORT, ESQ.

Counsel on behalf of Plaintiff

ROBERT M. MUSSELMAN, ESQ.
Charlottesville, Virginia

Counsel on behalf of Defendant Marjec, Inc.

WHARTON ALDHIZER & WEAVER, ESQS.
Harrisonburg, Virginia
By: WILLIAM E. SHMIDHEISER, III, ESQ.

Counsel on behalf of Defendant Estate of Nicholas C. Miller

THE COURT: . . . . On the issue which Mr. Mussleman [sic] raises about failure to comply, and I use this word though he didn't, precisely with the rules and I'm not sure there has been a failure to comply at this point. It seems to the court that while the initial notice order and so on resulted in the court directed the transfer to HILOAS [sic] of what was the common properties, road and maintenance fee charges with that further instruction to strike them may well have gone beyond that original notice.

But then on the petition of the appellete [sic] a re-hearing was had, and at that time it had to be obvious to the petitioner for re-hearing that the common properties, the roads and the mainetance [sic] fee charges were involved in what the bankruptcy court chose to enter so that there was no being taken by surprise in terms of the second or the granted re-hearing.

And of course, in the granted re-hearing the bankruptcy court re-affirmed its previous view. Had there been no re-hearing, I think Mr. Musselman's [sic] case would have been stronger. But here there was that opportunity afforded to speak to those elements in the bankruptcy court's judgment, which presumably some of which were not included in the notice and the original notice of hearing.

AFFIDAVIT

STATE OF VIRGINIA AT LARGE

CITY OF WINCHESTER, to-wit:

I, John R. Riley, Jr., of Winchester, Virginia, being first duly sworn, make oath that the following information is true and correct to the best of my knowledge, information and belief:

1. I am the County Administrator for Frederick County, Virginia and in such capacity am charged with the general administration of all aspects of County government. As a result of my duties, I have detailed knowledge of the circumstances and facts described in this affidavit.

2. On July 29, 1987, the Circuit Court for Frederick County entered an order establishing a sanitary district over several thousand acres in Western Frederick County, being the developed portion and a substantial amount of undeveloped lands of the Shawnee-Land Subdivision. It is my understanding that Marjec, Inc. has sought an appeal of that order from the Virginia Supreme Court but no stay or injunction which would interfere or impede the formation and operation of the sanitary district has been entered by any Court.

* * * *

6. The Sanitary District is now in full operation as a division of the County government. Separate accounts, bookkeeping records and general business records have been established; the Board of Supervisors has adopted a budget for the current operating year.

7. Presently, a general billing of Sanitary District assessments is being made bi-annually. A billing has been mailed for the last half of 1987 and approximately $160,000 have been received by the County on that bill-

ing. The next billing is set for May of 1988 which will cover the period from January through June of 1988.

8. During the Winter of 1987 and 1988 the Sanitary District engaged in snow removal operations in the Shawnee-Land Subdivision. Also, some work on buildings located on the common properties have been undertaken as well as some road repairs within Shawnee-Land. As of March 16, 1988 approximately $10,000 has been spent. However, most of the budget is for substantial road improvements and the asphalting which is necessary could not be performed until Spring weather.

* * * *

/s/ John R. Riley, Jr.
JOHN R. RILEY, JR.
County Administrator
County of Frederick, Virginia

Subscribed and sworn to before me, a Notary Public in and for the jurisdiction aforesaid, by John Riley on this 6 day of April, 1988.

My Commission expires July 21, 1989.

/s/ Carol F. Bayliss
Notary Public